

**AGREEMENT
BETWEEN OWNER AND CONTRACTOR
FOR CONSTRUCTION CONTRACT (STIPULATED PRICE)**

THIS AGREEMENT is by and between City of Newport, Lincoln County, Oregon ("Owner") and
KSH Construction Co. ("Contractor").

Owner and Contractor hereby agree as follows:

ARTICLE 1 – WORK

- 1.01 Contractor shall complete all Work as specified or indicated in the Contract Documents. The Work is generally described as follows:

The City of Newport – Safe Haven Tsunami Hill Retrofit:

Improvements shall be completed to the specifications of City, Engineer and FEMA. Complete improvements include the excavation and removal of existing pavement, trees and base materials, grading and paving of a new roadway and access areas to the hill top as well as excavation at the top of the hill. Also included in the Work is the construction of multi-use paths, sidewalks and hiking trail, as well as the installation of conduit for new street lights, and street light bases as shown on Plans.

Other Work shall include the widening of a foot path, wood retaining wall and wooden landing pads as well as the construction of culverts, v-ditches and a CMU-retaining wall.

ARTICLE 2 – THE PROJECT

- 2.01 The Project for which the Work under the Contract Documents may be the whole or only a part is generally described as follows: **City of Newport – Safe Haven Tsunami Hill Retrofit.**

ARTICLE 3 – ENGINEER

- 3.01 The Project has been designed by **Civil West Engineering Services, Inc.** ("Engineer") to act as Owner's representative, assume all duties and responsibilities, and have the rights and authority assigned to Engineer in the Contract Documents in connection with the completion of the Work in accordance with the Contract Documents.

ARTICLE 4 – CONTRACT TIMES

4.01 Time of the Essence

- A. All time limits for Milestones, if any, Substantial Completion, and completion and readiness for final payment as stated in the Contract Documents are of the essence of the Contract.

4.02 Contract Times: Days

- A. The Work will be substantially completed within 120 days after the date when the Contract Times commence to run as provided in Paragraph 4.01 of the General Conditions, and completed and ready for final payment in accordance with Paragraph 15.06 of the General Conditions within 150 days after the date when the Contract Times commence to run.
- B. Parts of the Work shall be substantially completed on or before the following Milestone(s):
1. Milestone 1 [event&date/days] - None

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4.03 *Liquidated Damages*

- A. Contractor and Owner recognize that time is of the essence as stated in Paragraph 4.01 above and that Owner will suffer financial and other losses if the Work is not completed and Milestones not achieved within the times specified in Paragraph 4.02 above, plus any extensions thereof allowed in accordance with the Contract. The parties also recognize the delays, expense, and difficulties involved in proving in a legal or arbitration proceeding the actual loss suffered by Owner if the Work is not completed on time. Accordingly, instead of requiring any such proof, Owner and Contractor agree that as liquidated damages for delay (but not as a penalty):
1. Substantial Completion: Contractor shall pay Owner \$ 850 for each day that expires after the time (as duly adjusted pursuant to the Contract) specified in Paragraph 4.02.A above for Substantial Completion until the Work is substantially complete.
 2. Completion of Remaining Work: After Substantial Completion, if Contractor shall neglect, refuse, or fail to complete the remaining Work within the Contract Time (as duly adjusted pursuant to the Contract) for completion and readiness for final payment, Contractor shall pay Owner \$ 550 for each day that expires after such time until the Work is completed and ready for final payment.
 3. Liquidated damages for failing to timely attain Substantial Completion and final completion are not additive and will not be imposed concurrently.
 4. Milestones: Contractor shall pay Owner \$ _____ for each day that expires after the time (as duly adjusted pursuant to the Contract) specified above for achievement of Milestone 1, until Milestone 1 is achieved.

ARTICLE 5 – CONTRACT PRICE

- 5.01 Owner shall pay Contractor for completion of the Work in accordance with the Contract Documents the amounts that follow, subject to adjustment under the Contract:

- A. For all Unit Price Work, an amount equal to the sum of the extended prices (established for each separately identified item of Unit Price Work by multiplying the unit price times the actual quantity of that item) as shown on the Bid Form, a sum of:

\$ \$424,364.00

The extended prices for Unit Price Work set forth as of the Effective Date of the Contract are based on estimated quantities. As provided in Paragraph 13.03 of the General Conditions, estimated quantities are not guaranteed, and determinations of actual quantities and classifications are to be made by Engineer as provided in Paragraph 10.06 of the General Conditions.

- B. For all Work, at the prices stated in Contractor's Bid, attached hereto as an exhibit.

ARTICLE 6 – PAYMENT PROCEDURES

6.01 *Submittal and Processing of Payments*

- A. Contractor shall submit Applications for Payment in accordance with Article 15 of the General Conditions. Applications for Payment will be processed by Engineer as provided in the General Conditions.

6.02 Progress Payments; Retainage

- A. Owner shall make progress payments on account of the Contract Price on the basis of Contractor's Applications for Payment on or about the 25th day of each month during performance of the Work as provided in Paragraph 6.02.A.1 below, provided that such Applications for Payment have been submitted in a timely manner and otherwise meet the requirements of the Contract. All such payments will be measured by the Schedule of Values established as provided in the General Conditions (and in the case of Unit Price Work based on the number of units completed) or, in the event there is no Schedule of Values, as provided elsewhere in the Contract.
1. Prior to Substantial Completion, progress payments will be made in an amount equal to the percentage indicated below but, in each case, less the aggregate of payments previously made and less such amounts as Owner may withhold, including but not limited to liquidated damages, in accordance with the Contract
- a. 95 percent of Work completed (with the balance being retainage) and
- b. 95 percent of cost of materials and equipment not incorporated in the Work (with the balance being retainage).
- B. Upon Substantial Completion of the entire construction to be provided under the Contract Documents Owner shall pay an amount sufficient to increase total payments to Contractor to 100 percent of the Work completed, less such amounts set off by Owner pursuant to Paragraph 15.01.E of the General Conditions, and less 100 percent of Engineer's estimate of the value of Work to be completed or corrected as shown on the punch list of items to be completed or corrected prior to final payment.

6.03 Final Payment

- A. Upon final completion and acceptance of the Work in accordance with Paragraph 15.06 of the General Conditions, Owner shall pay the remainder of the Contract Price as recommended by Engineer as provided in said Paragraph 15.06.

ARTICLE 7 – INTEREST

- 7.01 All amounts not paid when due as provided in Article 15 of the General Conditions shall bear interest at the rate allowed by Oregon law.

ARTICLE 8 – CONTRACTOR'S REPRESENTATIONS

- 8.01 In order to induce Owner to enter into this Contract, Contractor makes the following representations:
- A. Contractor has examined and carefully studied the Contract Documents, and any data and reference items identified in the Contract Documents.
- B. Contractor has visited the Site, conducted a thorough, alert visual examination of the Site and adjacent areas, and become familiar with and is satisfied as to the general, local, and Site conditions that may affect cost, progress, and performance of the Work.
- C. Contractor is familiar with and is satisfied as to all Laws and Regulations that may affect cost, progress, and performance of the Work.
- D. Contractor has carefully studied all: (1) reports of explorations and tests of subsurface conditions at or adjacent to the Site and all drawings of physical conditions relating to existing surface or subsurface structures at the Site that have been identified in the Supplementary Conditions, especially with respect to Technical Data in such reports and drawings, and (2) reports and drawings relating to Hazardous Environmental Conditions, if any, at or adjacent to the Site that have been identified in the Supplementary Conditions, especially with respect to Technical Data in such reports and drawings.

- E. Contractor has considered the information known to Contractor itself; information commonly known to contractors doing business in the locality of the Site; information and observations obtained from visits to the Site; the Contract Documents; and the Site-related reports and drawings identified in the Contract Documents, with respect to the effect of such information, observations, and documents on (1) the cost, progress, and performance of the Work; (2) the means, methods, techniques, sequences, and procedures of construction to be employed by Contractor; and (3) Contractor's safety precautions and programs.
- F. Based on the information and observations referred to in the preceding paragraph, Contractor agrees that no further examinations, investigations, explorations, tests, studies, or data are necessary for the performance of the Work at the Contract Price, within the Contract Times, and in accordance with the other terms and conditions of the Contract.
- G. Contractor is aware of the general nature of work to be performed by Owner and others at the Site that relates to the Work as indicated in the Contract Documents.
- H. Contractor has given Engineer written notice of all conflicts, errors, ambiguities, or discrepancies that Contractor has discovered in the Contract Documents, and the written resolution thereof by Engineer is acceptable to Contractor.
- I. The Contract Documents are generally sufficient to indicate and convey understanding of all terms and conditions for performance and furnishing of the Work.
- J. Contractor's entry into this Contract constitutes an incontrovertible representation by Contractor that without exception all prices in the Agreement are premised upon performing and furnishing the Work required by the Contract Documents.

ARTICLE 9 – CONTRACT DOCUMENTS

9.01 *Contents*

- A. The Contract Documents consist of the following:
 - 1. This Agreement
 - 2. Performance bond
 - 3. Payment bond
 - 4. General Conditions
 - 5. Supplementary Conditions
 - 6. Specifications as listed in the table of contents of the Project Manual.
 - 7. Drawings (not attached but incorporated by reference) consisting of:
 - Newport Safe Haven Tsunami Hill Retrofit: 21 sheets with each sheet bearing the following general title: Safe Haven Hill Tsunami Retrofit.
 - 8. Addenda (1-6)
 - 9. Exhibits to this Agreement (enumerated as follows):
 - a. Contractor's Bid
 - 10. The following which may be delivered or issued on or after the Effective Date of the Contract and may not be attached hereto:
 - a. Notice to Proceed
 - b. Work Change Directives
 - c. Change Orders

- d. Field Orders
 - e. Certificate of Substantial Completion
 - f. Contractors Application for Payment
 - g. Permits including but not limited to ODOT Permit to Perform Operations upon a State Highway
- B. The documents listed in Paragraph 9.01.A are attached to this Agreement (except as expressly noted otherwise above).
- C. There are no Contract Documents other than those listed above in this Article 9.
- D. The Contract Documents may only be amended, modified, or supplemented as provided in the General Conditions.

ARTICLE 10 – MISCELLANEOUS

10.01 Terms

- A. Terms used in this Agreement will have the meanings stated in the General Conditions and the Supplementary Conditions.

10.02 Assignment of Contract

- A. Unless expressly agreed to elsewhere in the Contract, no assignment by a party hereto of any rights under or interests in the Contract will be binding on another party hereto without the written consent of the party sought to be bound; and, specifically but without limitation, money that may become due and money that is due may not be assigned without such consent (except to the extent that the effect of this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract Documents.

10.03 Successors and Assigns

- A. Owner and Contractor each binds itself, its successors, assigns, and legal representatives to the other party hereto, its successors, assigns, and legal representatives in respect to all covenants, agreements, and obligations contained in the Contract Documents.

10.04 Severability

- A. Any provision or part of the Contract Documents held to be void or unenforceable under any Law or Regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Owner and Contractor, who agree that the Contract Documents shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

10.05 Contractor's Certifications

- A. Contractor certifies that it has not engaged in corrupt, fraudulent, collusive, or coercive practices in competing for or in executing the Contract. For the purposes of this Paragraph 10.05:
 - 1. "corrupt practice" means the offering, giving, receiving, or soliciting of any thing of value likely to influence the action of a public official in the bidding process or in the Contract execution;
 - 2. "fraudulent practice" means an intentional misrepresentation of facts made (a) to influence the bidding process or the execution of the Contract to the detriment of Owner, (b) to establish Bid or Contract prices at artificial non-competitive levels, or (c) to deprive Owner of the benefits of free and open competition;

3. "collusive practice" means a scheme or arrangement between two or more Bidders, with or without the knowledge of Owner, a purpose of which is to establish Bid prices at artificial, non-competitive levels; and
4. "coercive practice" means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in the bidding process or affect the execution of the Contract.

10.06 Other Provisions

- A. Owner stipulates that if the General Conditions that are made a part of this Contract are based on EJCDC® C-700, Standard General Conditions for the Construction Contract, published by the Engineers Joint Contract Documents Committee®, and if Owner is the party that has furnished said General Conditions, then Owner has plainly shown all modifications to the standard wording of such published document to the Contractor, through a process such as highlighting or "track changes" (redline/strikeout), or in the Supplementary Conditions.
- B. Pursuant to ORS 279C.505(1) – Contractor shall make payment promptly, as due, to all persons supplying the Contractor with labor or materials for the performance of the work provided for in the contract. Contractor shall pay all contributions or amounts due the Industrial Accident Fund from the contractor or subcontractor incurred in the performance of the contract. Contractor shall not permit any lien or claim to be filed or prosecuted against the Owner on account of any labor or material furnished.
- C. Pursuant to ORS 279C.505(2) – Contractor certifies that it has an employee drug testing program in place.
- D. If the Contractor fails, neglects or refuses to make prompt payment of any claim for labor or services furnished to the contractor or a subcontractor by any person in connection with the public improvement contract as the claim becomes due, the proper officer or officers representing the Owner may pay such claim to the person furnishing the labor or services and charge the amount of the payment against funds due or to become due the contractor by reason of the contract. Other provisions of ORS 279C.515 and ORS 279C.580 concerning payments also apply.
- E. Contractor shall comply with hours of labor rules Pursuant to ORS 279C.520, 279C.540, and 279C.545.
- F. Per ORS 279C.530, Contractor shall promptly, as due, make payment to any person, copartnership, association or corporation furnishing medical, surgical and hospital care services or other needed care and attention, incident to sickness or injury, to the employees of the contractor, of all sums that the contractor agrees to pay for the services and all moneys and sums that the contractor collected or deducted from the wages of employees under any law, contract or agreement for the purpose of providing or paying for the services. All subject employers working under the contract are either employers that will comply with ORS 656.017 or employers that are exempt under ORS 656.126
- G. Contractor shall pay workers not less than the applicable prevailing wage rate.
- H. Public Works Bond – Contractor shall have a public works bond filed with the Oregon Construction Contractors Board before starting Work on the Project unless exempt under ORS 279C.836. Contractor shall include in every subcontract a provision requiring every subcontractor to have a public works bond filed with the Oregon CCB before starting Work on the project unless exempt under ORS 279C.836.
- I. Contractor shall defend, hold harmless and indemnify Owner, its officers, agents, engineers, attorneys and employees from any and all losses, liability, damages, costs, expenses (including but not limited to all fees and charges of engineers, architects, attorneys and other professionals and all court or arbitration or other dispute resolution costs), claims, suits or actions whatsoever in nature, including intentional acts, resulting from or arising out of the activities of the Contractor or its subcontractors, agents, or employees under this Contract, subject to provisions of General Condition 7.18 as modified by Supplementary Condition 7.18G.

- J. The terms of this Agreement shall not be waived, altered, modified, supplemented, or amended, in any manner whatsoever, except by written instrument. Such waiver, alteration, modification, supplementation, or amendment, if made, shall be effective only in the specific instance and for the purpose given, and shall be valid and binding only if it is signed by all parties to this Agreement. The failure of Owner to enforce any provision of this Agreement shall not constitute a waiver by the Owner of that or any other provision.
- K. This Agreement shall be governed by and construed in accordance with the laws of the State of Oregon. Any litigation between the Owner and the Contractor arising out of or related to this Agreement which is not resolved pursuant to SGC 17.01 shall be brought and maintained solely and exclusively in the Circuit Court of the State of Oregon for Lincoln County. Provided, if any litigation arising under the Agreement must be brought in a federal forum, it shall be brought and maintained solely and exclusively in the United States District Court for the District of Oregon in Eugene, Oregon. Contractor hereby consents to the personal jurisdiction of all courts within the State of Oregon.
- L. Merger. This Agreement, which includes all Contract Documents as identified herein, constitutes the entire agreement between the parties. There are no understandings, agreements, or representations, oral or written, regarding this Agreement, except as specified or referenced herein. Contractor, by the signature below of its authorized representative, hereby acknowledges that it has read this Agreement, understands it, and agrees to be bound by its terms and conditions.
- M. This Agreement may be executed in counterparts, each of which shall be an original, and all of which shall constitute but one and the same instrument.

IN WITNESS WHEREOF, Owner and Contractor have signed this Agreement.

This Agreement will be effective on 8-24-15 (which is the Effective Date of the Contract).

OWNER: City of Newport

CONTRACTOR: KSH Construction Co.

By: Mr. Timothy Gross Spencer R. Noel

By: Kelly Hugult

Title: Public Works Director/City Engineer

Title: PRESIDENT

City Manager

(If Contractor is a corporation, a partnership, or a joint venture, attach evidence of authority to sign.)

Attest: _____

Attest: Christina Hugult

Title: _____

Title: Office Admin.

Address for giving notices:

Address for giving notices:

City of Newport City Hall

P.O. Box 21431

169 SW Coast Hwy

Keizer, OR 97307

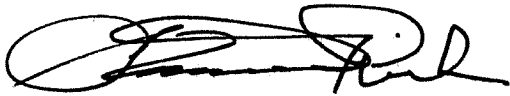
Newport, OR 97365

License No.: 166194

(where applicable)

(If Owner is a corporation, attach evidence of authority to sign. If Owner is a public body, attach evidence of authority to sign and resolution or other documents authorizing execution of this Agreement.)

Approved as to Form



City Attorney